**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 8**

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| **DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers, et al.** | |
| **and** | **Cases 08-CA-167313 et al.** |
| **CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC), et al.** | |

**GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENTS QHCCS, LLC AND QUORUM HEALTH CORPORATIONS' MOTION TO SEVER**

Counsel for the General Counsel respectfully opposes the Respondents QHCCS, LLC and Quorum Health Corporation (collectively, the Quorum Respondents) Motion to Sever and requests that this motion be denied for the reasons explained below.

## I. RELEVANT BACKGROUND[1]

On April 29, 2016, Respondent Community Health Systems, Inc. completed its spin-off of Respondent Quorum Health Corporation (QHC), creating a company which included 38 hospitals, including DHSC, LLC d/b/a Affinity Medical Center (Affinity), Hospital of Barstow, Inc. (Barstow) and Watsonville Hospital Corporation (Watsonville) (collectively, the Respondent Hospitals). (GC Exh. 213, 214, pp. 2-3; GC Exh. 215, 216, 217; and GC Exh. 198, pp. 2-4.). Respondent QHCCS, LLC (QHCCS) has been an affiliate of QHC, and is a management company that has provided services to QHC and to the Respondent Hospitals since April 29, 2016. (Tr. 23-24).

[1] General Counsel's Exhibits are herein referred to as GC Exh.___. Any transcript citations from 08-CA-167313, et al. are referred to as (Tr. ____) followed by the page number.

The present consolidated complaint and the ongoing consolidated action in DHSC, LLC, et al. d/b/a Affinity Medical Center, Cases 08-CA-117890, et al. (hereafter CHS I), concern allegations of widespread unfair labor practices committed by the Respondent Hospitals, as well as allegations that Respondent CHSI and Respondent CHSPSC, are single and/or joint employers with Respondent Hospitals. The instant consolidated complaint, like the ongoing consolidated action in CHS I, seeks a broad-remedial order on a corporate-wide basis.[2] Unlike the consolidated action in CHS I, the present consolidated complaint alleges that the Quorum Respondents are *Golden State* successors. *See* Golden State Bottling Co. v NLRB, 414 U.S. 168, 176 (1973).

On March 27, 2017, Counsel for Respondent QHCCS, joined by counsel for QHC made an oral motion to sever the Quorum Respondents from the instant matter. (Tr. 23-26). On April 26, 2017, Administrative Law Judge (ALJ) Geoffrey Carter issued an Order to allow the parties to file briefs concerning Respondents' Motion to Sever. On May 24, 2017, the Quorum Respondents filed their brief in support of their motion.

## II. ARGUMENT

General Counsel opposes the Quorum Respondents' Motion to Sever. The Quorum Respondents argue that (1) successorship issues should be litigated in the compliance stage; (2) litigation efficiency and judicial economy favor granting the Motion to Sever; and (3) related

[2] *See, e.g.*, Hickmott Foods, 242 NLRB 1357 (1979); J.P. Stevens, 244 NLRB 407 (1970), *enfd*. 668 F.2d 767 (4th Cir. 1979), *petition for cert. granted and remanded for reconsideration on other grounds*, 456 U.S. 924 (1982); Beverly California Corp., 326 NLRB 232 (1998), *enforced in relevant part sub nom.* Beverly California Corp. v. NLRB, 227 F.3d 817 (7th Cir. 2000).

proceedings pending in the D.C. Circuit may eliminate the need to litigate successorship issues.

For the reasons discussed below, the Quorum Respondents' arguments should be rejected. Granting Respondents' Motion to Sever will delay the litigation of the Quorum Respondents' successorship liability to the compliance proceeding. Such unnecessary delay will adversely impact the General Counsel's ability to adduce evidence in a timely manner and will promote the duplication of evidence during other stages of this proceeding. Based on Respondent Hospitals' history of recidivism, litigation of successorship during the unfair labor practice phase of the proceeding is necessary to preserve remedial effectiveness. Finally, Quorum Respondents' concerns regarding subsequent D.C. Circuit decisions should be wholly disregarded. Overall, as discussed below, the Quorum Respondents' should not be permitted to evade their responsibility under the Act by severing the successorship issues from the current proceeding.

### A. Severance Shall Cause Unnecessary Delay and Hamper the General Counsel's Ability to Adduce Evidence in a Timely And Efficient Manner.

An administrative law judge retains discretion to determine whether severance should be granted based on certain factors, including the likelihood of delay. Service Employees Local 87 (Cresleigh Management), 324 NLRB 774, 775-776 (1997). *See also* McDonalds USA, LLC, 363 NLRB No. 91, *slip op.* at 1-2 (Jan. 8, 2016). Section 3-430 of the Administrative Law Judge's Bench Book, sets forth relevant factors for consideration in evaluating a motion to sever which include: (1) the anticipated length of the trial on the threshold issue and remaining issue; (2) whether the same witnesses will be testifying on all issues; and (3) the possible adverse impact on the memory and availability of witnesses if litigation of the remaining issues is delayed.

The Quorum Respondents argue that this Motion should be granted because their liability can be litigated during a subsequent compliance proceeding. This argument ignores the undue

harm caused by any associated delay. It can often take months or years for a case to reach the compliance stage, and in a complex case like the present matter, such delay is inevitable. The General Counsel's interest in fair and economical adjudication of the case, as well as the public interest in effectuating the policies of the Act, will suffer irreparable harm and prejudice. For example, evidence concerning the successor allegations pertaining to the Quorum Respondents may become stale or rendered moot by any future circuitous business ventures of Respondent Hospitals and Quorum Respondents that could occur in the interim period. The length of time to get to a compliance proceeding will also have a deleterious impact upon witnesses' testimony and availability. The General Counsel should be afforded the opportunity to litigate the successor liability of the Quorum Respondents while the evidence is fresh, and before any further corporate restructuring obfuscates the relationship among these entities. Accordingly, this motion should be denied because severance will interfere with the General Counsel's ability to effectively and efficiently adduce evidence concerning these entities before the passage of time and intervening events renders this impossible.

At the single/joint employer phase of the unfair labor practice proceeding, the General Counsel shall adduce evidence regarding Quorum Respondents and their relationship with Respondent Hospitals, as well as their relationship with Respondent CHSI and Respondent CHSPSC. Contrary to Quorum Respondents' arguments, severing the successorship issues until the compliance phase of the proceeding would lead to duplicative testimony from Quorum witnesses necessary during the single/joint employer phase of the proceeding.

In its motion, Quorum Respondents reference rulings by ALJ Eleanor Laws in the CHS I proceeding concerning the denial of General Counsel's motion to amend the consolidated complaint to include the Quorum Respondents and her Order granting a bifurcation of the single/joint employer liability from the substantive unfair labor practice proceeding. Quorum

Respondents' reliance on these rulings, however, is misplaced. Unlike the CHS 1 proceeding, the instant complaint includes allegations that implicate evidence regarding Quorum Respondents at the unfair labor practice stages, particularly whether Respondent Hospitals failed and refused to provide information concerning the formation of Respondent QHC and whether such Respondent Hospitals unilaterally implemented changes to benefits, such as QHC Benefits Plus, long-term care insurance and 401(k) plans. *See*, Complaint ¶29(A)-(E), ¶30(A)-(C) [Affinity], ¶31(A)-(D), ¶34(A)-(F) [Barstow], ¶35(A)-(D), and ¶36(A)-(D) [Watsonville]). As outlined by your Honor's recent rulings at the Affinity hearing, evidence concerning the relationship between Quorum Respondents and the unilateral implementation of benefits at particular hospitals will be adduced at any single/joint employer hearing. (Tr. 1049-1051, 1078-1079).

Further, ALJ Laws' orders are not binding on the instant proceeding. ALJ Laws denied the motion to amend in the Quorum Respondents under different circumstances than those present here. Unlike the CHS I litigation, the General Counsel is not seeking to add new parties into the case after complaint issued. Rather, the instant complaint provided the Quorum Respondents with adequate notice of its successorship liability. Further, as some of the record has already developed, and some evidentiary issues have already been addressed, permitting the General Counsel to fully present the successorship evidence is a more efficient, rather than waiting until a compliance proceeding when evidence will be stale and the legal issues may be moot. Thus, there is little reason to order severance in this case where the circumstances do not support granting such a motion.

In McDonald's USA, LLC, 363 NLRB No. 91, *slip op*. at 1 (Jan. 8, 2016), the Board, in sustaining the ALJ's order denying respondents' motion to sever and affirming consolidation of complaints, stated:

> Given the commonality of the evidence he intends to present, the General Counsel has elected to have one proceeding that will result in a single decision in which the judge makes all of her findings on McDonald's joint-employer status with each franchisee, as well as on the merits of each unfair labor practice allegation. All of the judge's rulings, findings, and conclusions in this single proceeding can then be reviewed by the Board and, if further appealed, by one court of appeals.

The Board also noted that many of respondents' concerns regarding consolidation could be ameliorated with case management orders. McDonald's, *supra*, *slip op.* at 2. Likewise, in the instant case, litigation efficiency and judicial economy favor one proceeding at the unfair labor practice stage of the proceeding to address the successor liability of the Quorum Respondents which is interrelated with the unfair labor practices at issue. Any concerns by Respondents regarding such an approach can be handled through case management orders. In sum, General Counsel contends that the preferred course is the full litigation of this case in the unfair labor practice proceeding rather than delayed to the compliance stage.

**B. The Recidivist Nature of Respondents' ULP Misconduct Militates Against Severance.**

The Respondents' history of unfair labor practice violations necessitates litigating matters during the initial liability phase to preserve remedial effectiveness. Respondent Hospitals have a lengthy history of prior unfair labor practices and a likelihood of recurrence or extension of the instant unfair labor practices. The General Counsel has demonstrated Respondent Hospitals' unfair labor practices' immediate and deleterious impact upon unit employees, through the

various 10(j) petitions, and the most recent 10(j) injunction granted in Barstow.[3] Respondents CHSPSC and CHSI as a single integrated enterprise and joint employer with the Respondent Hospitals should also be considered recidivists. Accordingly, the Quorum Respondents, as corporate owners of the three named Respondent Hospitals, and as successors to Respondents CHSPSC and CHSI, share in this history of recidivism. With regard to the present litigation, Quorum Respondents have already attempted to use inappropriate means to evade responsibility, seeking to have a federal district court enjoin their participation in the instant action, an invitation that the district court correctly refused.[4] Considering this history, Quorum Respondents as *Golden State* successors to Respondents CHSI and CHSPSC should not be permitted to extricate themselves from the corporate history of their Respondent Hospitals.

[3] Multiple Board and Federal Court orders, including in some cases, Section 10(j) temporary injunctions, have issued against Respondents Affinity and Barstow. These hospitals are currently alleged to be single and joint employers with Respondents CHSPSC and CHSI. The prior Board decisions demonstrate a pervasive pattern of violations of Section 8(a)(1), (3), and (5) of the Act. *See, e.g.,* Affinity Medical Center, 362 NLRB No. 78 (2015); and Barstow Community Hospital, 361 NLRB No. 34 (2014). On January 22, 2014, the General Counsel obtained a Section 10(j) injunction against Respondent Affinity in the District Court for the Northern District of Ohio, which ordered, among other things, that Respondent Affinity recognize and bargain in good faith with the Union. *See* Calatrello v. DHSC, LLC d/b/a Affinity Medical Center, 2014 WL 296634 (N.D. Ohio Jan. 24, 2014) (Adams, J.) (order granting injunctive relief). As demonstrated by the cases in the instant litigation alone, General Counsel alleges that Respondent Affinity continues to evade its bargaining obligations and continues to engage in opprobrious Section 8(a)(5) misconduct. On May 2, 2016, the Regional Director for Region 8 filed yet another Section 10(j) petition in the United States District Court Northern District of Ohio against Respondent Affinity. (See the petition filed in Binstock v. DHSC, LLC d/b/a Affinity Medical Center, 5:16-CB-01060-BYP). On August 2, 2013, the General Counsel obtained a Section 10(j) injunction against Respondent Barstow in Cases 31-CA-090049 and 31-CA-096140 from the United States District Court for the Central District of California. *See* Rubin v Hospital of Barstow, Inc., d/b/a/ Barstow Community Hospital, No. 5:15-CV-00933-CAS (DTBx) (Aug. 2, 2013). On August 29, 2016, the United States District Court for the Central District of California granted another 10(j) petition involving Barstow. *See* Rubin v. Hospital of Barstow, Inc., No. EDCV 16-1600, 2016 WL 4547152 (C.D. Cal. August 29, 2016).

[4] Paintsville Hospital Company, LLC d/b/a Paul B. Hall Regional Medical Center v. NLRB, No. 7:17-cv-56-KKC (E.D. Ken. March 24, 2017).

### C. Potential D.C. Circuit Decisions Should Not Be Considered.

Quorum Respondents also assert that the appeals before the D.C. Circuit may overturn the certifications at Barstow and Affinity, and thus negate the need for a determination of the successor liability for the Quorum Respondents. This argument is not appropriate because the prior Board decision is binding, regardless of what a circuit court subsequently decides.[5] Further, Quorum Respondents do not challenge the validity of the Watsonville certification, thus successorship status will need to be litigated in any case. In any event, neither case before the D.C. Circuit is likely to materially affect the present case. Even if the D.C. Circuit were to deny enforcement to the Board's order compelling bargaining pursuant to the certifications at Barstow and/or Affinity, it will not overturn the underlying *elections*, and thus the unfair labor practices at issue would not be significantly affected.[6] Finally, contrary to Respondent's assertion, there is no "judicial trend" of federal circuit courts invalidating Board decisions in these circumstances, and in fact the opposite. The Fourth Circuit considered the same arguments currently before the

[5] *See, e.g.*, Pathmark Stores, Inc. & Local 342-50, United Food & Commercial Workers Union, AFL-CIO, 342 NLRB 378, 378 n.1 (2004) (the Board holding that established Board precendend which has not been reversed by the Supreme Court should be applied).

[6] *See, e.g.*, Sub-Acute Rehab. Ctr. at Kearny, LLC d/b/a Belgrove Post Acute Care Ctr, 361 NLRB No. 118 (Nov. 25, 2014); Benjamin H. Realty Corp., 361 NLRB No. 103 (Nov. 13, 2014); Manor at St. Luke Vill. Facility Operations, LLC d/b/a the Manor at St. Luke Vill. & the Pavilion at St. Luke Vill. Facility Operations, LLC d/b/a the Pavilion at St. Luke Vill., 361 NLRB No. 99 (Dec. 16, 2014). In addition, settled law, establishes that employers act at their peril in making unilateral changes following a tally of ballots showing that a majority has voted in favor of certifying a union, even where no valid Board certification has yet issued. *See, e.g.*, Mike O'Connor Chevrolet, 209 NLRB 701, 703 (1974), *enforcement denied and remanded on other grounds*, NLRB v. Mike O'Connor Chevrolet-Buick-GMC, Co., 512 F.2d 685 (8th Cir. 1975).

D.C. Circuit in Barstow,[7] in NLRB v. Bluefield Hosp. Co., LLC, and rejected them, affirming the Board's authority.[8] In addition, the D.C. Circuit rejected similar arguments in UC Health v. NLRB[9] and SSC Mystic Operating Co. v. NLRB.[10] Based on the above, there is no reason to assume that the D.C. Circuit will obviate the issues in this case, and full litigation of the charges should proceed as normal.

## III. CONCLUSION

As set forth above, the inclusion of the Quorum Respondents in this stage of the proceeding is necessary for the fair and efficient resolution of the underlying unfair labor practice charges. Accordingly, the General Counsel respectfully requests that the Respondents' Motion to Sever should be denied in its entirety.

DATED at Cleveland, Ohio this 21st day of June, 2017

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[7] On August 29, 2014, the Board issued its Decision and Order in Hospital of Barstow, Inc., 361 NLRB No. 34 (2014). Respondent Barstow filed a petition for review with the United States Court of Appeals for the D.C. Circuit. On April 29, 2016, the D.C. Circuit remanded its case to the Board. Hospital of Barstow, Inc. v. N.L.R.B., 820 F.3d 440 (D.C. Cir. 2016). On July 15, 2016, the Board issued its Supplemental Decision and Order. Hospital of Barstow, Inc., 364 NLRB No. 52 (2016). On September 9, 2016, Barstow filed a Motion for Reconsideration and on September 30, 2016 filed a Petition for Review. *See* USCA Case #16-1289.
[8] 821 F.3d 534 (4th Cir. 2016).
[9] 803 F.3d 669 (D.C.Cir.2015).
[10] 801 F.3d 302 (D.C.Cir.2015).

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, was filed electronically with the National Labor Relations Board, Division of Judges, and served by electronic mail, as designated below, on the 21st day of June, 2017 on the following parties:

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**DATED** at Cleveland, Ohio this 21st day of June, 2017

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